

Hyatt on Union Square and Marc Norton. Case 20-CA-15967

December 3, 1982

DECISION AND ORDER**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

On May 11, 1982, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief; and the Respondent filed cross-exceptions and a supporting brief to rulings made by the Administrative Law Judge at the hearing, in addition to an answering brief to the Charging Party's exceptions.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

¹ In its cross-exceptions and supporting brief, the Respondent stated that, if the Board did not adopt the recommended Order, it wished to except to various rulings made by the Administrative Law Judge in the course of the proceeding. The Board has no provision for cross-exceptions conditioned on its disposition of the case, and, therefore, we have treated the Respondent's "conditional" cross-exceptions merely as cross-exceptions. After carefully examining the rulings made by the Administrative Law Judge we find no merit in the Respondent's cross-exceptions. *Spalding, Division of Questor Corporation*, 225 NLRB 946, fn. 1 (1976).

² The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION**STATEMENT OF THE CASE**

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard in San Francisco, California, on February 2, 3, and 4, 1982. The charge and amended charge were filed respectively on January 20 and 23, 1981, by Marc Norton, an individual. The complaint,

which was issued on June 26, 1981, alleges that Hyatt on Union Square, herein called the Hotel, violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended.

Issue

The Hotel suspended employee Marc Norton on January 19 and discharged him on January 22, 1981. The issue is framed by the General Counsel's contention that the Hotel's action was in reprisal for Norton's protected activities, including those relating to his position as shop steward, and the Hotel's contention that Norton was fired solely for unprotected activity, including cursing at a supervisor and threatening him with bodily harm.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witness, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Hotel,¹ and the Charging Party.²

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT**I. THE BUSINESS OF THE HOTEL**

The Hotel, a California corporation with an office and place of business in San Francisco, California, is engaged in the operation of a hotel providing food and lodging for guests. During the calendar year immediately preceding issuance of the complaint, the Hotel derived gross revenues in excess of \$500,000. During the same period, the Hotel purchased and received at its San Francisco, California, facility goods valued in excess of \$50,000 directly from points outside California. The Hotel is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Hotel and Restaurant Employees and Bartenders Union, Local 2, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

¹ In their briefs counsel for the General Counsel and the Hotel request that the rulings on certain motions they made at the hearing be reconsidered. For the reasons set forth in the record, I believe those rulings were correct. The requests for reconsideration are therefore denied.

² Marc Norton filed a brief on behalf of himself. By motion dated April 15, 1982, counsel for the Hotel seeks an order dismissing the complaint, or, in the alternative, striking Norton's brief in its entirety on the ground that it constitutes an impermissible attempt to offer testimony after the close of hearing and contains "hundreds of lies, misleading innuendoes, and absurdities." Even a cursory perusal of Norton's brief does establish that it contains a great deal of material that is not based on record testimony or exhibits. I will therefore strike all assertions in that brief that are not based on record testimony or exhibits. It is so ordered. Except to that extent, the motion of counsel for the Hotel is hereby denied.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Sequence of Events*

1. Background

The Hotel opened for business in 1973. From the beginning it had contractual relations with a number of labor organizations, including the Union herein. Of its approximately 500 to 550 nonmanagerial employees only about 25 are nonunion. In general the Hotel has maintained good relations with the labor organizations. The Hotel is a member of the Hotel Employers Association of San Francisco, which deals with about 12 labor organizations, including the Union herein. On July 17, 1980, the Union undertook a strike against the members of the Association. The strike ended about August 15, 1980. Thereafter, the Association and the Union entered into a collective-bargaining agreement that was effective from July 1, 1980, to August 14, 1983. Prior to that contract there was no provision for the Hotel to deal with shop stewards. In the negotiations for the contract the Union requested almost unrestricted activity for shop stewards during working hours. The agreement that was finally reached stated that stewards were to discharge their responsibilities "during working hours provided that there is no disruption in work and that prior arrangements are made with the immediate supervisor of the steward and the employee contacting the shop steward." An understanding was reached between the parties that the shop stewards would attend a training course given by the Institute of Industrial Relations at University of California Berkeley. In that training course stewards were told that they were not to leave their work stations in the performance of their duties as shop steward without getting the permission of their supervisors. They were also told that a supervisor had the right to refuse to discuss a grievance at a particular time and that if a supervisor did so they were to call a business agent. The contract provided that the number of shop stewards at each hotel was to be determined by that hotel and the Union. The Union and the Hotel agreed that there would be 22 shop stewards. One of those shop stewards was Marc Norton, the alleged discriminatee.

Norton worked for the Hotel as a dishwasher from September 1979 until his suspension on January 19, 1981. During that time he received favorable job evaluations and he was considered by the Hotel to be a good worker.

Near the end of December 1979 Lisa Puliafico, who at that time was an executive steward and a supervisor for the Hotel,³ told one of the chefs, Charles Shockley, that he was to keep an eye on Norton, that Norton was not going to hang around to win his case,⁴ and that if Norton was not performing his duties he should be written up.⁵ Puliafico was three levels removed from the

general manager and she left the Hotel's employ in April 1980, which was before the strike. Norton was given formal written evaluations on January 30 and December 5, 1980. He received high ratings in both of those evaluations. Taking those evaluations into consideration, there is no reason to doubt Puliafico's testimony that no one from the Hotel ever told her to get Norton or to treat him differently.

Norton was an active union member. In March 1980 he was elected by the employees in the stewards' departments⁶ at the Association hotels to the union negotiating committee. He actively campaigned for that position on a platform that called for hard-line negotiations and active preparation for a strike. Beginning May 1, 1980, he attended 30 or 40 negotiating sessions, some of which were also attended by John Dixon, the Hotel's general manager, who was on the Association's committee. At one meeting Dixon asked who Norton was and at another meeting Dixon accused Norton of spreading lies concerning the Hotel's contracting out of work. When the strike began on July 17, 1980, Norton was very active on the picket line and he was considered by some to be informal head picket captain. During the strike the Hotel's food and beverage manager, Elmiger, in a conversation with a striker named Tomas Bell, referred to Norton as a revolutionary.

When the strike ended on or about August 14, 1980, Norton vocally opposed ratification of the strike settlement agreement. He made his opposition known to both employees and management by openly speaking about his position.

After the strike ended Norton was elected shop steward for the Hotel's stewards' department. In that capacity he processed a number of grievances. He was also a member of the Union's safety committee.⁷ He attended his first safety committee meeting with company officials on December 29, 1980. At that time he raised a number of issues.

2. The events of January 18, 1981

On January 18, 1981, Norton worked in the Hotel's plaza kitchen from 4 p.m. to midnight. His supervisor was Tomas Rodas. At or about 10:45 p.m. that evening another employee, Eugene Fletcher, came into the kitchen and spoke to Norton. Fletcher worked in the stewards' department of the Hotel and Norton was shop steward for that department. That evening Fletcher had been working upstairs in the Hotel in Hugo's One-Up Restaurant. He told Norton that the manager of the restaurant, Michael Minassian, had instructed him to empty some garbage from behind the bar, that he told the manager that it was not his job, that the manager ordered him to do it anyway, that he refused to empty the gar-

³ The executive steward was a management position in the stewards' department of the Hotel.

⁴ From the statements of counsel, it appears that an incident occurred involving Norton at a Christmas party in 1979 that was resolved by a settlement agreement.

⁵ This finding is based on the testimony of Shockley. Puliafico, in her testimony, denied making those remarks. I credit Shockley.

⁶ The stewards' departments of the hotels consisted of employees who cleaned the kitchen, washed dishes, and performed like duties.

⁷ When Norton originally asked to be on the safety committee, the Hotel took the position that he was not eligible. After a discussion between the Hotel and the Union, Norton and another person were placed on the safety committee and two people who had been on the committee were removed from it.

bage, and that the manager called security, suspended him, and sent him home.⁸

Norton told Fletcher to wait with the security people and he then left his work station and went upstairs to talk to Minassian. His supervisor was not present in the plaza kitchen at that time and Norton left his work station without seeking permission.⁹

Norton had occasionally in the past left his work station without permission to process grievances but there was no evidence that the Hotel was aware that he had done so on those occasions.

Norton took the elevator upstairs to Hugo's One-Up Restaurant and as he was leaving the elevator he met Supervisor Tomas Rodas, who was waiting to enter the elevator. Norton asked Rodas where the manager was and Rodas responded by saying that he did not know but that the manager was around. Norton then walked away.¹⁰

Michael Minassian was the manager of the Hotel's Hugo's One-Up Restaurant and as such he supervised about 25 to 30 employees. He began working at the Hotel in mid-September 1980, about a month after the strike ended.

When Norton arrived in the kitchen of the restaurant, he asked to see the manager. Minassian, who at the time was having his dinner in the restaurant, was informed that somebody wanted to see him in the kitchen. He came out and met Norton. Prior to that time Norton and Minassian had never seen each other. Minassian had not even heard Norton's name before that time and they were complete strangers. Minassian introduced himself as the manager and Norton introduced himself as Fletcher's shop steward. In the conversation that followed Norton kept insisting that Minassian discuss the Fletcher incident with him and Minassian kept saying that he did not want to talk about it. Minassian told Norton there would be a meeting in the personnel office the following day at 3 p.m. concerning the matter and that Norton was more than welcome to be there but that he did not want to discuss the matter with Norton then and there. Norton was intransigent in insisting that they discuss it immediately but Minassian refused to do so. What happened after that is a subject of sharp dispute. Five witnesses testified concerning the incident.

Norton testified that he told Minassian: "I'll see you at 3 o'clock tomorrow and it probably won't be the last time I'll see you on this if that's going to be your attitude." He denied that he used any profanity or directed any threats toward Minassian. Norton further testified as follows. As he was walking away from Minassian, Katherine Carvalho,¹¹ a cashier who overheard the entire

⁸ Norton testified that he had the impression from what Fletcher told him that Fletcher had asked Minassian to have a shop steward present. In fact Fletcher had not made that request to Minassian.

⁹ Norton's supervisor, Rodas, was in the Hotel at the time and he carried a beeper so that he could have been contacted by Norton if Norton had sought to do so.

¹⁰ This finding is based on the testimony of Rodas. Norton testified that he told Rodas he wanted to talk to the manager and that Rodas shrugged and said, "Okay." As is indicated below I do not think that Norton was a reliable witness and I credit Rodas.

¹¹ Sometimes referred to by her married name, Katherine LaFranc.

conversation, shouted, "Marc, Marc, now you're doing it, now you're being insubordinate." At that point Minassian said, "Yeah, yeah, that's right. You were being insubordinate. You were threatening me—Now I am going to get you fired, too. We're finally going to get you."

Minassian's version of the incident was as follows. Near the end of the conversation Norton started yelling. Minassian did not raise his voice. Norton came within a foot of Minassian and said, "Fuck you." Minassian thought that Norton was going to hit him and he stepped back. Norton then said, "I'll get even with you later. I'll get you outside."¹²

Katherine Carvalho is presently head food and beverage cashier and as such she is a management employee. She was promoted to that position on March 20, 1981. At the time of the incident in question she was a cashier, a member of the Union, and a shop steward for the Union. She overheard the entire conversation between Norton and Minassian. She testified that Norton used the "F" word and said to Minassian, "I'll get you outside. You haven't seen the last of me yet." She also testified that from her observation of the scene she thought there was going to be a fight.¹³

Richard Esparza was a waiter in the restaurant who walked into the kitchen from the dining room and heard at least part of the discussion between Norton and Minassian. He was a member of the Union. He averred that their faces were about a foot and a half apart and he heard Norton say in what could be a threatening tone of voice "I'll see you outside, buddy."¹⁴

Aquiles Aranda was a bus person who was present during the incident. He testified that Norton became aggressive and looked as if he were going to hit Minassian; that Norton said "Fuck" and told Minassian that he was going to take care of him. He averred that he did not see Norton get closer than 2 feet to Minassian.

¹² Minassian testified that he recalled Norton saying "Fuck you" and "I'll get you outside" but that he did not have a clear present recollection of whether Norton said that he would get even. After reviewing a statement he gave shortly after the incident he testified that the statement was true and that he remembered the incident more precisely at the time the statement was given. The statement was read into the record as a past recollection recorded. In that statement Minassian quoted Norton as saying "Fuck you. I'll get even with you later. I'll get you outside."

¹³ A few days later Norton approached Carvalho in the union hall and accused her of lying. (Before that time she had given a statement to the Hotel which quoted Norton as saying "Fuck you. I'll fix you later. I'll get you outside.") She replied, "Marc, knock it off. You know what you did and you went into a rage and directed filthy language at her in front of about 24 business agents. She also credibly averred that Bob Jacobs, the director of the business agents, took Norton by the arm and shoved him out of the door saying "... we won't tolerate such language to any woman or to anybody here in the union hall." Not long thereafter, Carvalho allegedly made some derogatory remarks about Norton to Tomas Bell. However, even if those remarks were made, there is no basis for concluding that Carvalho's testimony at the hearing was based on a bias against Norton. If there was a bias it can easily be attributable to Norton's outburst at the union hall and before that happened she had given a written statement that was substantially the same as her testimony at the hearing. At the time she gave that statement she shared a substantial community of interest with Norton. They were both rank-and-file employees, they were both union members, and they were both shop stewards.

¹⁴ Esparza gave a statement shortly after the incident in which he stated that Norton cursed at Minassian. That part of the statement was read into the record as a past recollection recorded.

I have little hesitation in crediting Minassian's version of the incident over Norton's. Norton's assertion that Minassian, after being prompted by shop steward Carvalho, said, "Yeah, yeah, that's right. You were being insubordinate. You were threatening me—Now I am going to get you fired, too. We're finally going to get you," was not believable. Minassian had never met Norton before and did not even know his name. I believe that Norton put words in Minassian's mouth that were never said or implied by Minassian and that as a result Norton has destroyed his credibility. Minassian was a convincing witness when he testified and three witnesses who overheard the conversation substantiated the basic tenor of his testimony. The General Counsel and the Charging Party argue that disparities in the testimony of those three witnesses undermined their credibility. However, those disparities were more easily attributable to differences in individual perceptions rather than to any basic variations that would undermine Minassian's credibility. In sum, I find that Norton left his work station without the permission of his supervisor, that he insisted on discussing a grievance with Minassian right there and then when Minassian said that the matter would be discussed in personnel at 3 o'clock the next day, and that, when Minassian continued with his refusal to discuss the grievance, Norton lost his temper, acted in such a way that Minassian thought that he was going to hit him, and said, "Fuck you," "I'll get even with you later," and "I'll get you outside." That action constituted not only gross insubordination but a threat of physical violence to Minassian.

3. The suspension and the discharge

On the evening of January 18, 1981, Minassian called Henry Diaz, the Hotel's personnel director, at Diaz' home. He reported to Diaz the details of his encounter with Norton. Diaz told Minassian to write everything down and leave the report in his mailbox. Minassian wrote out the details in longhand and in that memorandum stated that Norton had told him "Fuck you. I'll get you outside." The memorandum goes on to state, "Henry, please note: This type of humiliation I will not tolerate from an employee or anyone else. I expect some type of action taken, and I will help you to do so . . ."

At 1 p.m. on January 19, 1981, which was the following day, Diaz took a more detailed statement from Minassian. In that statement Minassian quoted Norton as saying "Fuck you. I'll get even with you later. I'll get you outside." Minassian also gave the names of various witnesses.

Norton went into Diaz' office about 3 p.m. on January 19, 1981. Diaz gave him a letter stating that he was suspended until further notice pending investigation of "a charge of misconduct, including use of vulgar, abusive, and threatening language, to management personnel." The letter requested Norton's attendance at a meeting scheduled for January 20, 1981, to discuss the charges and to determine any possible discipline or discharge.¹⁵

¹⁵ In that January 19 meeting Diaz also gave Norton a warning notice relating to an allegedly unauthorized leaflet that had been put on the Hotel's bulletin board. That leaflet said, "Hi, my name is Marc Norton," but Norton denied to Diaz that he had posted it even though he admitted

Diaz secured a number of statements from employees who had witnessed the January 18 incident. On January 19 Diaz spoke to union shop steward Carvalho who signed a statement saying that Norton had told Minassian "Fuck you. I'll fix you later. I'll get you outside." On January 20 Diaz spoke to bus person Aquiles Aranda who signed a statement saying that: "I was scared; I was ready for anything, for trouble. Mike [Minassian] was trying to be nice; he tried to keep the conversation nice." The statement also quotes Norton as saying "What the fuck do you think you are. . . . Fuck . . . (pointing at Mike [Minassian]) you're going to see what's going to happen to you from all this." On January 19 Diaz also spoke to Norton's supervisor, Rodas, who told him that he had not given Norton permission to leave his work station the previous evening.

The meeting between Diaz and Norton was postponed and took place on January 22, 1981. Union business agent Colin Piper also attended as did Assistant Personnel Director Edie Robinson. Diaz said that Minassian had reported that Norton had said, "Fuck you. I'll get even with you. I'll get you outside," and he asked Norton for his version of the incident. Norton denied making any of those remarks to Minassian. At the end of the meeting Diaz asked Norton to come back at 3 p.m.¹⁶ Later that day Diaz discharged Norton. Norton was given a written statement which indicated he was discharged for violation of house rules relating to "(1) threatening a manager (2) disrespectful conduct, using vulgarity to a manager (3) leaving your work area without permission (4) failure to make prior arrangements before discharging your duties as shop steward." The discharge memorandum also indicated that Norton had told Minassian "Fuck you. I'll get even with you later. I'll get you outside."

After Norton was discharged a request was made that he be reinstated. Pursuant to that request Diaz made a further inquiry concerning the January 18, 1981, incident. On January 24 he spoke to Esparza, the waiter who had witnessed the incident. Esparza signed a statement which said: "Marc [Norton] really started yelling at Mike [Minassian], standing very close to him. I heard Marc say to Mike 'I'll see you outside, buddy.' He cursed Mike. I don't recall what the word was, but he definitely cursed at Mike." Diaz decided not to reinstate Norton.

4. The treatment of other discharged employees

The Hotel has an employee manual which it distributes to all its employees. That manual lists 14 actions by employees that are considered just cause for immediate suspension, and, pending review, dismissal. Included in such actions are ". . . threats of any kind against guests, supervisors or fellow employees," and "disrespectful

at the hearing that he had posted it. (Norton testified that he simply refused to say whether he posted it while Diaz testified that Norton denied posting it. As between Diaz and Norton, I credit Diaz.) As a result of that denial the warning notice was withdrawn. There is no allegation that the warning notice constituted a violation of the Act.

¹⁶ Norton testified that Diaz told him that the executive committee would make a decision. Diaz testified that the decision was his and that executive committee did not meet that day. I credit Diaz.

conduct; using vulgarity or failing to give a high degree of service and courtesy to any guest or supervisor." In another section of the manual there is a list of acts which are considered just cause for remedial actions which could involve reprimand, suspension, or dismissal. Among those actions are "leaving your department or work area without permission from your supervisor; being in other than your assigned work area without authorization."

There was extensive testimony concerning all of the employees terminated in the 2 years preceding the hearing. There were 26 such terminations. There were discharges for making unsolicited advances to a guest, for insubordination and cursing at a supervisor, for leaving work early and returning to the hotel as an uninvited guest at a guest's party, for being tardy less than 10 times, for stealing a box of mints valued at less than \$5, for returning late from a scheduled vacation, and for a wide variety of other reasons. Most of the discharges were for misconduct far less serious than that of Norton's. A review of the details of those discharges makes it quite clear that Norton was not singled out for unusually harsh treatment. Diaz credibly testified that after examining the Hotel's records he was unaware of any situation where an employee threatened a supervisor in front of employees except for the case of Norton and another employee named Ramadan. Ramadan was discharged for that offense in 1978.

In sum, the General Counsel has not shown that Norton was subjected to disparate treatment because of any protected activity on his part.

B. Analysis and Conclusions

Norton was active in internal union affairs, was one of a number of employees on the Union's negotiation committee, was active in the July 17 through August 15, 1980, strike, was one of the union representatives on the safety committee, and was one of 22 shop stewards. However, the General Counsel has not established that the Hotel was hostile toward employees who engaged in such activities. The evidence in the record establishes that the Hotel had a good working relationship with labor organizations, including the Union herein. There is also little to establish that the Hotel harbored the type of animus against Norton that would give it motivation to discharge him because he engaged in such activities. Indeed, the formal written job evaluation of December 5, 1980, just a month and a half before his discharge, indicated that the Hotel thought Norton was a very desirable employee. If the Hotel were trying to set Norton up for discharge it is most unlikely that the evaluation would have been so favorable. Personnel Director Diaz, who made the decision to discharge Norton, testified that the sole reason for the discharge was Norton's conduct on January 18, 1981. I believe that testimony.

On January 18, 1981, Norton left his work station without permission in order to confront a supervisor with a grievance. That was done even though the collective-bargaining agreement provided that a steward could discharge his responsibility during working hours only when there was no disruption of work and where prior arrangements had been made with a supervisor. Norton

insisted on discussing the grievance with Supervisor Minassian even after Minassian refused to discuss it at that time and place and after Minassian invited Norton to attend a meeting about the grievance at 3 p.m. the following day in the personnel office. When Minassian continued with the refusal to discuss the grievance Norton acted in such a way that Minassian thought that he was going to hit him and Norton said, "Fuck you," "I'll get even with you later," and "I'll get you outside." That constituted gross insubordination and a threat of violence.

A shop steward engages in protected activity when he processes a grievance. There is some question as to whether a shop steward's insistence that a grievance be discussed at a particular time and place chosen by that shop steward is also protected. However, even if we assume that such an insistence is part of the protected activity, I do not believe that the General Counsel has established his case.

There are some situations where conduct which is not ordinarily protected by the Act is so intertwined with protected activity that discipline for the unprotected activity will have such a chilling effect on the protected activity that even the unprotected activity cannot be used as a basis for discipline. In such situations, the protected and the unprotected activity are in effect merged together under a "*res gestae*" or "animal exuberance" theory. Thus, a shop steward cannot be disciplined for questioning the credibility of a management official if that questioning takes place in the context of a debate over a grievance. *Crown Central Petroleum Corporation*, 177 NLRB 322 (1969); *Bettcher Manufacturing Corporation*, 76 NLRB 526 (1948). In a similar vein, in some circumstances the use of obscene language in the course of the processing of a grievance cannot be used as a basis for discipline. *Illinois Bell Telephone Company*, 259 NLRB 1240 (1982); *United States Postal Service*, 250 NLRB 4 (1980); *Firch Baking Company*, 232 NLRB 772 (1977); *Webster Clothes, Inc., d/b/a Webster Men's Wear, a subsidiary of Beck Industries, Inc.*, 222 NLRB 1262 (1976). However, Norton's conduct in the instant case was much more serious than the conduct of the employees in the cases cited above. His conduct involved unprovoked, gross insubordination and a threat of violence that was so disruptive of the Employer's right to maintain order and discipline that it could not be justified in any legitimate balance between that right and an employee's right to engage in impulsive behavior related to protected activity. Nor can it be said that proscription of that type of conduct by an employer will have an unduly chilling effect on the processing of grievances. The Board has refused to find a violation where discipline has been imposed on shop stewards who engaged in far less serious conduct than that of Norton. In *New Process Gear, Division of Chrysler Corporation*, 249 NLRB 1102, 1108 (1980), the Board affirmed the Decision of Administrative Law Judge George Norman who held that an employer did not violate the Act by disciplining a steward who made personal attacks on foremen, resorted to obnoxious obscenities, and refused to follow established procedures in an orderly manner to the point of insubor-

dination. Similar findings have been made where an employee disobeyed an order to stop shouting about a grievance. *Calmos Combining Co.*, 184 NLRB 914 (1970); *Charles Meyers & Company*, 190 NLRB 448 (1971).

In *Fibracan Corp.*, 259 NLRB 161 (1981), the Board held:

[W]e adopt the Administrative Law Judge's finding that employee Van Nostrand was lawfully discharged for her use of profane language on March 16 and 21, and that absent her use of profanity there was no reason for Plant Manager Minton to single her out from the other nine employees who also walked out on March 16 and whose employment Minton continued. As more fully described by the Administrative Law Judge, Van Nostrand directed profanity against the plant manager at the meeting preceding the March 16 walkout and again at the March 21 interview to discuss her continued employment, when after being specifically informed by Minton that he found her earlier use of abusive language objectionable, she replied by repeating the prior profanity. We find this repeated and blatant use of profanity in reply to a supervisor's statement of its objectionability amounted to insubordination. Consequently, the Respondent's response was a lawful exercise of its rights to maintain order and respect. See *N.L.R.B. v. Thor Power Tool Company*, 351 F.2d 584 (7th Cir. 1965), enfg. 148 NLRB 1379 (1964). Thus, even taking into full consideration the context in which these remarks were made, we find that this intentional insubordination is sufficiently

egregious to remove Van Nostrand's activities from any protection they might have otherwise enjoyed. See *New Process Gear, Division of Chrysler Corporation*, 249 NLRB 1102, 1108-09 (1980); *Calmos Combining Co.*, 184 NLRB 914, 914-915 (1970).

If there was no violation in those cases, *a fortiori*, there was no violation in the instant case. I therefore recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Hotel is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not established by a preponderance of the credible evidence that the Hotel violated the Act as alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁷

The complaint is dismissed in its entirety.

¹⁷ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.